

These are the tentative rulings for civil law and motion matters set for Thursday, October 31, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, October 30, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0058674 U.S. Bank, N.A. vs. Skiff, Bob

Defendant's Motion to Set Aside Default Judgment is denied. Defendant has failed to make a sufficient showing of mistake, inadvertence, surprise, and/or excusable neglect under CCP§473(b).

2. M-CV-0058698 Auburn Ridge Woods, LLC vs. Huff, Heather

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, such argument shall heard in Department 43:

Plaintiff's unopposed Motion to Set Aside Award of Sanctions is granted. While the court has broad discretion when imposing sanctions upon a party, due process requires that the parties be given notice prior to the imposition of any sanction. (see e.g. CCP§177.5, 128.5; *O'Brien v. Cseh* (1983) 148 Cal.App.3d 957, 961; *Blumenthal v. Superior Court* (1980) 103 Cal.App.3d 317; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637; *Corralejo v. Quiroga* (1984) 152 Cal.App.3d 871.) Plaintiff submits a declaration stating that it was not served with the notice setting the OSC re sanctions hearing. (Thomas declaration.) The court file confirms that plaintiff was not properly served as the proof of service shows that plaintiff's counsel was served at an improper address. The court file also shows that the notice was returned to the court as undeliverable. Since the plaintiff was not properly noticed of the OSC hearing, the court vacates the \$500 sanction order against plaintiff and vacates the dismissal of the action entered on August 23, 2013. Plaintiff may resubmit another Request to Set Case for Trial to set the matter for a court trial. The clerk is instructed to update the court's records with the plaintiff's current address of record.

3. M-CV-0059320 Nationstar Mortgage LLC vs. Aunda, Virginia L.

Defendant Ben Thompson's Motion to Strike is denied. The request for judicial notice is denied as defendant failed to present the documents subject to judicial notice. The motion has procedural and substantive defects. First, defendant failed to properly serve plaintiff with the current motion, mailing it to the improper zip code. Even if plaintiff had properly served the motion, it would still be denied. A motion to strike may be granted to strike irrelevant, false, or improper matters in a pleading; or to strike a pleading not drawn in conformity with the laws of the state or an order of the court. (CCP§436(a), (b).) A review of the complaint establishes that it sufficiently alleges a cause of action for unlawful detainer contrary to defendant's assertions. For these reasons, the motion is denied.

4. M-CV-0059384 Meridian Apartments, L.P. vs. Gray, Xzavier

The Application for Order Permitting Default is dropped from the calendar as no moving papers were filed with the court.

5. M-CV-0059400 2001 Opportunity, LLC vs. Capital Gun Club, et al

The motion for summary judgment is dropped from the calendar as no moving papers were filed with the court.

6. S-CV-0028391 Higgs, Roy vs. Colliau, Russell W., et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be heard on October 31, 2013 at 8:30 a.m. in Department 43.

Rulings on Objections

Defendant Russell Colliau's Evidentiary Objections are overruled. Colliau objects to numerous paragraphs of the declarations, without specifying the exact statements that are objectionable. Although the paragraphs may contain certain objectionable statements, they also contain statements that are not objectionable. As presented, Colliau has not properly identified the statements to which objections are made.

Plaintiff Roy Higgs' Objections to Defendants' Evidence are ruled on as follows: Objection Nos. 1, 4, 7 and 9-12 are sustained. Objection Nos. 2, 3, 5, 6, 8, 13 and 14 are overruled.

Ruling on Plaintiff's Motion to Amend Judgment

Plaintiff's Motion to Amend Judgment to Add Judgment Debtor is denied.

The complaint in this action was filed in December 2010, and involves a dispute between two shareholders of the corporation Inspection Management Systems, Inc. (“IMS”). Plaintiff Roy Higgs (“Higgs”) alleges that majority shareholder Russell Colliau (“Colliau”) misappropriated IMS funds to pay expenses for other companies he owned, including defendants United Professional Real Estate Inspectors, Mold Detectives and Husbands for Rent (collectively, the “Corporate Defendants”). Colliau also filed a cross-complaint against Higgs, alleging breach of the duty of loyalty to IMS. This action fostered a considerable amount of law and motion practice from the outset, and a discovery referee was appointed in January 2012.

On July 27, 2012, the discovery referee issued Findings and Recommendations of the Discovery Referee Set No. Four, wherein he found that the Corporate Defendants had intentionally and in bad faith refused to produce documents in response to plaintiff’s valid Request to Produce Documents. The discovery referee recommended that default judgment be entered against the Corporate Defendants as a sanction for their misuse of the discovery process. The discovery referee denied plaintiff’s request that terminating sanctions also be entered against Colliau. On May 13, 2013, the court adopted the Findings and Recommendations of the Discovery Referee Set No. Four, with the exception that judgment would not be entered on the Corporate Defendants’ defaults absent a prove-up hearing. On June 24, 2013, a prove-up hearing was conducted, and judgment entered against the Corporate Defendants. Plaintiff now moves to amend the default judgment pursuant to Code of Civil Procedure 187, to add Colliau as a judgment debtor on the theory that Colliau is an alter ego of the Corporate Defendants.

Under Code of Civil Procedure section 187, the court has the power to amend a judgment to add an additional judgment debtor. *Dow Jones v. Avenel* (1984) 151 Cal.App.3d 144, 148. A judgment may be amended to add an additional judgment debtor on the grounds that a person is the alter ego of the original judgment debtor. *Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1029. “This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant.” *NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778 (cit. omit.) “Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.” *Id.* (cit. omit.)

However, courts have expressed due process concerns and declined to permit such an amendment under Code of Civil Procedure section 187 where judgment is taken by default. *Motores de Mexicali, S.A. v. Superior Court* (1958) 51 Cal.2d 172, 175–176 (where judgment obtained by default, court stressed that alter ego’s interests were not represented in the underlying action, and adding them as additional judgment debtors would violate due process); see also *NEC Electronics, Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 779–780 (following *Motores* where corporate defendant did not appear at trial or attempt to defend lawsuit). In this case, default judgments have been entered against the Corporate Defendants. However, Colliau answered the complaint, remains a

party in the action, and has been actively litigating his defenses and cross-claims against Higgs. Terminating sanctions were requested, and denied, as against Colliau. It is also noteworthy that although Higgs cites to numerous cases discussing the propriety of adding a *non-party* as a judgment debtor on an alter ego theory, Higgs provides no authority for the ability of the court to take the action sought here, to amend a default judgment to add an separately named individual defendant who has answered the complaint and is actively litigating the action.

Higgs also provides very little evidence regarding Colliau's control of the litigation with respect to the Corporate Defendants. Higgs' motion is supported only by his declaration, and the declaration of his attorney, neither of whom submit testimony or evidence regarding Colliau's purported financing and control over the course of the litigation with respect to the Corporate Defendants. *See NEC Electronics, Inc. v. Hurt, supra*, 208 Cal.App.3d at 781; *Marcus v. Superior Court* (1977) 75 Cal.App.3d 204, 211, n. 3 (element of control of the litigation is essential to finding privity between the corporation and the individual). Higgs does attest to instances of commingling between the Corporate Defendants and the Colliaus. However, the issues of commingling between the Colliaus, IMS and the Corporate Defendants, and the extent to which corporate formalities may have been inappropriately disregarded are highly disputed core issues in this case. While the Corporate Defendants have lost their ability to participate in defense of this action, Higgs does not provide adequate justification to remove Colliau's right to defend against the claims made against him personally. Accordingly, Higgs' Motion to Amend Judgment to Add Judgment Debtor is denied.

7. S-CV-0029141 Cooley, David, et al vs. Centex Homes

Plaintiffs' Motion for Order Directing Service on SGN Construction, Inc. by Secretary of State

Plaintiffs' Motion for Order Directing Service on SGN Construction, Inc. by Secretary of State is granted. Plaintiffs shall be permitted to serve the summons and complaint in this action on SGN Construction, Inc. by personally delivering the same to the Secretary of State of California, or to an assistant or deputy secretary of state.

If oral argument is requested, plaintiffs' request for telephonic appearance is granted. Effective July 1, 2013, all telephonic appearances must be arranged through CourtCall. See Local Rule 20.8.A.2.

Centex Homes' Motion for Protective Order

Centex Homes' Motion for Protective Order was continued by stipulation of the parties to December 17, 2013 at 8:30 a.m. in Department 40.

8. S-CV-0030126 Cappawana, George, et al vs. Centex Real Estate Corp., et al

Defendant/Cross-Complainant Centex's Motion for Consolidation and cross-defendant J.R. Pierce's Joinder to the Motion for Consolidation are continued, on the court's own motion, to November 14, 2013 at 8:30 a.m. in Department 40.

9. S-CV-0030186 Kostiz, Patrick D. vs. Rosene Classics, Inc., et al

Lawrence E. Skidmore's Motion to be Relieved as Counsel for defendants Gregory Rosene and Rosene Classics, Inc. is granted and he shall be relieved as counsel of record effective upon the filing of the proof of service of the signed order upon defendants.

10. S-CV-0030888 Higgs, Roy Aaron vs. Colliau, Russell

The appearance of the parties is required for the arraignment on the OSC re Contempt.

11. S-CV-0031148 Mazzoni, Nello, et al vs. Centex Real Estate Corp., et al

Defendant/Cross-Complainant Centex's Motion for Summary Adjudication and Cross-Defendant St. Paul and Fire Insurance Company's Motion for Summary Adjudication are continued, on the court's own motion, to November 14, 2013 at 8:30 a.m. in Department 40.

The court notes that Centex also reserved a hearing for a motion for summary judgment. However, there are no such moving papers in the court file. The reserved hearing on defendant/cross-complainant Centex' motion for summary judgment is dropped from the calendar.

Defendant/Cross-Complainant Centex's Motion for Consolidation, cross-defendant Aspen Insurance Company's Joinder to the Motion for Consolidation, and cross-defendant J.R. Pierce's Joinder to the Motion for Consolidation are also continued, on the court's own motion, to November 14, 2013 at 8:30 a.m. in Department 40.

The parties' requests for telephonic appearances are granted and the parties need not file new requests for the continued hearing date. However, the parties are informed that they must make arrangements for the telephonic appearances through CourtCall pursuant to Local Rule 20.8.A.2.

12. S-CV-0031202 L'Amoreaux, Roger, et al vs. Baldwin Contracting Co., et al

Cross-Defendants' Demurrer to Baldwin Contracting Company's Second Amended Cross-Complaint (SACC) is overruled.

Cross-defendants' request for judicial notice is granted.

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) The current demurrer challenges the second and third causes of action. A review of the SACC shows that cross-complainant has alleged sufficient facts to support the second cause of action for violations under H&S 25300 et seq. and the third cause of action for contractual indemnity.

Cross-defendants shall file and serve their answer or general denial on or before November 15, 2013.

The requests for telephonic appearances are granted. The parties are informed that they must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

13. S-CV-0032390 Fernhoff, James, et al. vs. Mache, Ruth

Defendant's demurrer to the complaint is sustained with leave to amend. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) As currently pled, all four causes of action fail to allege sufficient facts to state an exception to the statute of frauds. The allegations within each cause of action are pled in conclusory fashion with insufficient factual allegations demonstrating an exception. Based upon the foregoing, the demurrer is sustained with leave to amend.

The amended complaint shall be filed and served on or before November 15, 2013.

14. S-CV-0032688 Rothe, Deric Evan vs. Davis, Kirsten Adalee

The motion to strike the complaint is dropped from the calendar at the request of the moving party.

15. S-CV-0032888 Vo, Chinh T. vs. Kumar, Vinod, et al

Defendant's Demurrer is sustained with leave to amend. A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are

judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.)

The court strikes the declaration of Chinh T. Vo. At demurrer the court may not consider evidence beyond the matters alleged in the complaint. (CCP§430.30.)

The first cause of action is for breach of contract. To prevail in an action for breach of contract, plaintiff must show: (1) the existence of a contract between the parties; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's failure to perform (breach); and (4) resulting damages. (*Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) The essential elements of contract formation are parties capable of contracting, consent, a lawful object, and consideration. (Civil C§1550.) The complaint does not sufficiently allege the essential elements of contract formation. Thus, the first cause of action fails.

Fraud must be specifically pled, with facts stating how, when, where, to whom and by what means any misrepresentations were made to a plaintiff. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) The second cause of action fails to allege the level of specificity necessary for a fraud action. Based upon the foregoing, the demurrer is sustained with leave to amend.

The amended complaint shall be filed and served on or before November 15, 2013.

16. S-CV-0033396 Roberts, Kenneth, et al vs. JPMorgan Chase, Inc., et al

Defendant JP Morgan Chase's Demurrer and defendant Bank of America's Demurrer are dropped from the calendar as plaintiff filed a dismissal on October 28, 2013.

17. S-CV-0033502 Watkins, Brian Taylor vs. Valverde, George Director of Calif

Tentative Decision on Petition for Writ of Mandate

The court denies the petition.

I. Ruling on Request for Judicial Notice

Petitioner's request for judicial notice is granted.

II. Background

This is a petition for writ of mandate after a written determination issued by the Department of Motor Vehicles (hereinafter "DMV"). On July 15, 2013, the DMV issued a Decision on a driver's license suspension hearing where Petitioner's driving privileges were suspended for driving under the influence.

The suspension arose from Petitioner's arrest on April 25, 2013. Officer Forman of the Auburn Police Department was on patrol at 9:52 p.m. in Old Town. Petitioner was traveling on Lincoln Way in a silver Dodge pickup and failed to signal when turning right. Officer Forman also observed that Petitioner's registration had expired. He then initiated a traffic stop.

Petitioner pulled over and Officer Forman spoke to him regarding the expired registration tags. During this conversation, he observed Petitioner's eyes were red and watery along with slurred speech. Officer Forman also smelled a strong odor of alcohol within the vehicle. He then asked Petitioner to step out of the vehicle to conduct a field sobriety test. Officer Forman asked if Petitioner had been drinking to wit Petitioner responded that he had consumed two alcoholic beverages. Petitioner displayed symptoms of impairment such the field sobriety test. Officer Forman then requested that Petitioner provide a preliminary alcohol screening device (hereinafter "PASD") sample. Petitioner's results from two screenings were .081 and .082 blood alcohol level (hereinafter "BAC"). Officer Forman then arrested Petitioner for driving under the influence. He then explained implied consent to Petitioner and asked if he would submit to either a breathalyzer or a blood test. Petitioner stated that he would submit to a blood test.

When Petitioner arrived at the Placer County Jail, he requested to speak to an attorney prior to giving a sample. Officer Forman explained informed consent to Petitioner twice more before canceling the blood draw and completing a form stating that Petitioner refused to provide an evidentiary sample.

On April 25, 2013, Petitioner was served with an Administrative Per Se Suspension/Revocation Order and Temporary Driver License. He requested that the matter be heard before a hearing office on May 2, 2013. A DMV hearing on Petitioner's suspended license was originally set for June 3, 2013 but was continued to July 2, 2013. Evidence submitted at the hearing included Officer Forman's Arrest Report/Probable Cause Report, the testimony of phlebotomist M. Perez, and Petitioner's medical records. The hearing officer issued a Notification of Findings and Decision on July 15, 2013. The hearing officer found Officer Forman had reasonable cause to believe Petitioner was driving a motor vehicle under the influence and lawfully arrested Petitioner. The hearing officer further found that Petitioner was informed that his driving privileges would be suspended or revoked if he refused to complete the required testing. It was also found that Petitioner refused or failed to complete the testing after being requested to do so by a peace officer. Petitioner then filed this writ of mandate on August 13, 2013.

III. Analysis

A. Standard of Review

Judicial review of a final decision or order of a DMV license suspension is governed by Vehicle Code section 13559(a) and Code of Civil Procedure section

1094.5. It is well established that the standard of review applicable after a final decision of a DMV license suspension is the independent judgment the court. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395; *Lake v. Reed* (1997) 16 Cal.4th 448, 456; *Roelfsema v. Department of Motor Vehicles* (1995) 41 Cal.App.4th 871, 875.) As such, the court will exercise its independent judgment in reviewing the writ.

B. Discussion

Petitioner seeks to set aside and revoke the DMV's order suspending his driving privileges. During the administrative hearing, the DMV had the burden of proving the facts necessary to support the Petitioner's suspension. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536.) This case involves the law of implied consent which "mandates that an arrestee is required to submit and complete one of the tests upon their first having been offered to him by an arresting officer". (Vehicle Code §23612; *Dunlap v. Department of Motor Vehicles* (1980) 156 Cal.App.3d 279, 280.) Vehicle Code §23612 is violated where a party initially refused to take a test after being requested to do so. (*Barrie v. Alexis* (1984) 151 Cal.App.3d 1157, 1161.)

Petitioner's asserts that based upon his medical condition, Officer Forman's admonitions regarding informed consent were not effectively communicated so Petitioner never refused to complete a test. The submitted evidence does not support this assertion. Officer Forman admonished petitioner no less than three times as to implied consent. While Petitioner initially agreed to a blood test. When he arrived at the jail, however, Petitioner wanted to speak to an attorney prior to completing a blood test. Such actions refute the assertion that his medical condition confused his understanding of implied consent. What it does demonstrate is that Petitioner conditioned his consent upon speaking with an attorney, which constitutes a refusal. (*Finley v. Orr* (1968) 262 Cal.App.2d 656, 667; *Kessler v. Department of Motor Vehicles* (1969) 1 Cal.3d 74, 77-78; *Fallis v. Department of Motor Vehicles* (1968) 264 Cal.App.2d 373, 382.)

IV. Disposition

The Petition is denied. The DMV, as the prevailing party, is directed to prepare a formal order incorporating the court's ruling herein verbatim and a judgment consistent with the ruling. The prevailing party shall then submit them to Petitioner for approval as to form and thereafter submit them to the court for signature and entry of judgment in accordance with California Rules of Court, Rules 3.1312 and 3.1590.

18. S-CV-0033594 Turtletaub, Paula vs. Evergreen Advantage, LLC, et al

Defendant's Demurrer is continued, on the court's own motion, to November 14, 2013 at 8:30 a.m. in Department 40. The court is informed that a first amended complaint will be filed in this case.

Petitioner's OSC re Preliminary Injunction is denied. The court may grant a preliminary injunction when it appears from the complaint that the plaintiff is entitled to the demanded relief and the plaintiff would suffer irreparable injury if the enjoined action were allowed to proceed. (CCP§526(a).) When determining whether to issue a preliminary injunction, the court weighs the likelihood of whether the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999-1000.) Petitioner is unable to show the likelihood of prevailing on the merits of her action. The deficiency in her pleading stems from her pursuit of an improper method of challenging the hearing officer's ruling. The procedure for declaring a dog vicious is specifically addressed in Food and Agricultural Code §31621 et seq. The exclusive method for challenging a vicious dog determination is through the filing of an appeal pursuant to Food and Agricultural Code §31622(a). Such an appeal is conducted de novo and without a jury. (Food and Agricultural Code §31662(b).) Since petitioner's writ petition and complaint for preliminary injunction are an inappropriate method of challenging the vicious dog determination, there is no likelihood that petitioner will prevail on these claims. Thus, petitioner's request is denied.

Nevertheless, the court notes that petitioner also filed a proper and timely notice of appeal. Respondent does not oppose the temporary restraining order remaining in effect during the pendency of the appeal. Therefore, the temporary restraining order issued on October 7, 2013 shall remain in effect pending the appeal.

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